BRIEF

In Support of Petition for Writ of Certiorari.

The **statement of the grounds of jurisdiction**, the **statement of the case**, and the **specification of errors**, required by Rule 27, are all set out in the foregoing petition for certiorari.

SUMMARY OF ARGUMENT AGAINST THE CONSTITUTIONALITY OF SECTION 12-H.

The language of section 12-H, including, as it does, purely intrastate practices in connection with state and substate elections, coupled with the failure of Congress to limit the application of the section to companies engaged in interstate commerce, and the failure to limit the prescribed contributions to those which affect interstate commerce, together with the absence of any declaration by Congress that such contributions affect interstate commerce, or any provision for an administrative finding that they have such effects, make it clear that the section is not a valid exercise of the commerce power.

ARGUMENT.

(1) Constitutional Questions.

The Government conceded in its brief in the court below that the validity of section 12-H does not rest upon the power to regulate federal elections or the mails or the instruments of commerce. It sought to sustain section 12-H in its entirety, solely under the commerce clause of the Constitution. It is the contention of petitioner that section 12-H is not a valid exercise of the power to regulate commerce among the several states.

At the outset, we wish to point out that section 12-H is not restricted to corporations engaged in interstate com-

merce; it includes "any registered holding company, or any subsidiary thereof," irrespective of whether or not such company or subsidiary is engaged in interstate commerce. The fact of registration does not include engagement in interstate commerce—companies whose business is wholly intrastate, or having subsidiaries whose business is wholly intrastate, may be required to register. This is demonstrated in detail by reference to and analysis of the pertinent sections of the act, in petitioner Union Electric Company's petition for rehearing below, pages 2-4 (R. 1280-2). The constitutional questions presented to this Court are not limited or qualified by the evidence in this particular case. It is the statute itself that is being tested.

The local contributions of registered holding companies or any subsidiary not engaged in interstate commerce, made wholly intrastate to local candidates, cannot affect interstate commerce because such company would not be engaged in any such commerce. If political contributions can affect interstate commerce, it can only be by reason of some supposed effect on the commerce of the company making them, and if such company does not engage in interstate commerce, then there is no such commerce to be affected.

This, in itself, is enough to invalidate section 12-H because, where the language of a criminal statute embraces acts beyond the federal power, the courts cannot limit it by construction to acts that might be within the federal power.

> James v. Bowman, 190 U. S. 127, l. c. 139-142;
> U. S. v. Reese, 92 U. S. 214, l. c. 221;
> The Employers' Liability cases, 207 U. S. 463, l. c. 496-501.

We contend further, however, that even if it were true as the court below assumed, that section 12-H applies only to corporations that are engaged in interstate commerce,

still Congress may not regulate their purely intrastate activities unless they have a close and substantial relation to interstate commerce—and we submit that no such relation here exists.

In all the recent cases where the power of Congress to deal with intrastate activities has been upheld, the statute in question has specifically limited its operation to activities having such effect.

N. L. R. B. v. Jones & Laughlin Steel Corp'n, 301 U. S. 1, l. c. 22, 23 and footnote, 24, 30, 31, 32;
Currin v. Wallace, 306 U. S. 1, l. c. 5, 9, 13;
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, l. c. 392, 393;
U. S. v. Darby, 312 U. S. 100, l. c. 109 and footnotes, 110;
U. S. v. Wrightwood Dairy Co., 315 U. S. 110, l. c. 116,

and in all of the individual cases arising in the course of the administration of the statutes held valid in the above cases, the orders of the administrative agencies or boards charged with the administration of the act, have only been upheld when the Court could find from the evidence before it that the activity in question did, in fact, substantially affect interstate commerce.

Santa Cruz Packing Co. v. N. L. R. B., 303 U. S. 453, syl. 6, l. c. 466;
N. L. R. B. v. Fainblatt, 306 U. S. 601;
A. B. Kirschbaum v. Walling, 316 U. S. 517;
Wickard v. Filburn, 317 U. S. 111, l. c. 125-9;
Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88.

Section 12-H is not limited to contributions that affect interstate commerce. The act contains no finding or declaration by Congress that the prescribed contributions have any such effect, and the act provides for no finding by any administrative agency as to the effect of any such

contributions on interstate commerce. There is, therefore, no basis for the assumption that any relationship exists between the prescribed contributions and interstate commerce.

The only suggestion contained in the opinion below, as to how such contributions might affect interstate commerce, is that they constitute "such a lack of economy in management and operation as directly to affect or burden interstate commerce" (Opinion of the Court of Appeals, R. 1237-8). It is obvious, however, that certain of the prescribed contributions cannot reasonably or rationally have any such effect, to wit, small contributions of a few dollars, large contributions made infrequently, contributions in any amount and no matter how frequent, if made by registered holding companies or their subsidiaries **not** engaged in interstate commerce.

The court below apparently recognized that trivial contributions could not reasonably affect interstate commerce, but held that the contributor was not removed from the scope of federal regulation when the sum of all such contributions may be far from trivial. Wickard v. Filburn, 317 U. S. 111, 127-8.

We submit, however, that there is no parallel whatever between this case and Wickard v. Filburn. There this Court held that, although the excess wheat grown in that particular case was trivial, it became a part of the total supply overhanging the market, and that the sum of such excess wheat produced by all growers was "far from trivial" and affected the price of wheat moving in interstate commerce.

In this case, however, there is no relation whatever between a contribution made by one corporation and a similar contribution made by another. Neither could affect the assets or the interstate business of any company, except the one making the contribution. The total of all contributions made by all registered corporations

might affect elections, but the accumulation thereof could not affect in any way the interstate business of any particular corporation.

Further, we submit that no wasteful expenditure can have any effect upon interstate commerce unless the corporation guilty of it is engaged in interstate commerce and hence, as to such companies at least (and Section 12-H includes them), there can be no possible reasonable or rational basis for assuming any relationship between the prescribed contributions and interstate commerce.

Finally, we submit that the entire conception of any close or substantial relationship between the prescribed contributions and interstate commerce is fanciful and far-fetched.

This Court has often pointed out that every activity of a corporation engaged in interstate commerce, if pursued through all its distant repercussions, may, in an ultimate sense, in some way affect interstate commerce, but these distant repercussions have never been deemed sufficient to bring the matter within the reach of the federal power.

Justice Cardozo said, in the Schechter case (295 U. S. 495, l. c. 554), "to find immediacy or directness here is to find it almost everywhere."

This Court has always maintained the distinction recognized in the Constitution itself between what is national and what is local. N. L. R. B. v. Jones & Laughlin Steel Corp'n, 301 U. S. 1, l. c. 29, 30, 37.

We therefore submit that section 12-H, in its entirety, is clearly beyond the power of Congress under the Commerce Clause of the Constitution.

We have heretofore pointed out in the petition, supra, the importance of this question and the reasons why it should be settled by this Court. To what we have said, we add, only by way of further argument, that in the Electric Bond & Share case, 303 U. S. 419, l. c. 435, this Court held specifically that the decision in that case was without

prejudice to the future challenge of the validity of any provision of the act or requirement of the Commission outside of sections 4 (a) and 5. This suit is such a challenge, and we respectfully submit that it presents a question that should be settled by this Court.

(2) **Separability.**

Section 12-H cannot be saved by striking out the words "or otherwise," because these words apply to contributions to candidacies "for or to any office or position in the Government of the United States," the regulation of which is within the federal power (U. S. v. Classic, 313 U. S. 299). The doctrine of separability does not permit cutting down a valid provision in order to save an invalid one—see the Employers' Liability Cases, 207 U. S. 463, l. c. 501, where this Court said to do so would be "to destroy in order to save and to save in order to destroy."

The only remaining possibility is to strike the words "a state or any political subdivision of a state" from paragraph 1 of section 12-H, and to rewrite paragraph 2 thereof so as to limit its application to contributions made to parties or committees for use in federal elections. Where the provisions of a statute are thus "interwoven," separability is impossible (Electric Bond & Share Co. v. SEC, 303 U. S. 419, l. c. 434-5). Nor can a statute be thus rewritten—Railroad Retirement Board v. Alton R. Co., 295 U. S. 330, l. c. 362. Nor can the Court "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain"—Hill v. Wallace, 259 U. S. 44, l. c. 70, and U. S. v. Reese, 92 U. S. 214, l. c. 221. Further, as said by this Court in Williams v. Standard Oil Co., 278 U. S. 235, a separability clause "is an aid merely; not an inexorable command," l. c. 241, and the test of its application is whether or not there is a "clear probability that, the invalid part being eliminated, the Legislature would not have been satisfied with what

remained," l. c. 242. There is such a clear probability here. If rewritten and restricted to federal elections, there would be no need for section 12-H. The same field is covered more comprehensively in the Federal Corrupt Practices Act of 1925, 2 U. S. C. A., Sec. 251, 43 Stats. 1074.

The obvious purpose of section 12-H is to prohibit registered holding companies or their subsidiaries, or anyone on their behalf, from making any contribution to any candidate or to any election and thereby take them completely out of politics.

This purpose would not be accomplished by merely reenacting, in different form, the section of the Federal Corrupt Practices Act, 2 U. S. C. A., Sec. 251, which now makes it

> "* * * unlawful * * * for any corporation whatever to make a contribution in connection with any election at which presidential and vice presidential electors or a senator or a representative in, or a delegate or resident commissioner to, Congress are to be voted for, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section."

Fines are imposed against any corporation violating this section, and fine and imprisonment are imposed upon any officer and director consenting. It would thus seem that there is at least a clear probability that Congress would not have been satisfied with section 12-H if rewritten and limited merely to federal elections. We say, therefore, that the separability clause cannot save any part of section 12-H.

This is the first case in which section 12-H has been attempted to be enforced by criminal action; it is, therefore, the first time that its validity and construction have been challenged. The section involves a novel exercise of federal power. It more directly affects the general public than any other section in the act. The questions raised

have not been decided by this Court. They are of great importance, and the decision thereof of great public interest. We respectfully submit that they should be heard and decided by this Court.

(3) Construction of Section 12-H.

In plain and unambiguous terms, section 12-H is limited to contributions made in connection with the "candidacy" of any person for any office or position. The fact that the recipient of the contribution be a candidate is an essential element of the offense. It does not include contributions made in contemplation of the recipient becoming a candidate—he may change his mind and never file or seek the office, in which case no offense could have been committed; yet the trial court, against petitioner's exception, charged the jury that payments made to persons not candidates could be considered on the question of guilt if made in contemplation of such persons becoming candidates for office (see charge quoted supra in petition, and R. 1187), and the Court of Appeals disallowed petitioner's assignment of error based on this charge (R. 1258).

The rule strictissimi juris applies to the construction of criminal statutes, and they cannot be enlarged by implication or intendment to include offenses not clearly expressed in their terms (59 C. J., Statutes, Sec. 660, pages 1115-6 and note 27). Federal cases so holding are cited supra in our petition.

Even were section 12-H ambiguous—which it is not—the ambiguity would not be resolved so as to create an offense not clearly expressed in its terms.

U. S. v. Zenith Radio Corp'n, 12 Fed. (2d) 614, syl. 2, l. c. 617;
Krichman v. U. S., 256 U. S. 363, l. c. 367-8.

In the Viereck case (318 U. S. 236, l. c. 243-4) this Court said:

> "While Congress undoubtedly had the general purpose to regulate agents of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely because we think they might more successfully have effectuated that purpose."

So, here, to the words "any contribution whatsoever in connection with the candidacy * * * of any person" there cannot be interpolated the words "or in contemplation of candidacy." We submit that the opinion in the Viereck case directly sustains petitioner on this point.

The opinion below, in dealing with this point (R. 1257-8), omitted to quote the part of the charge that misconstrued the statute, and to which our exception was specifically directed. It quoted only the paragraph following (R. 1187). It is necessary that this omitted part be considered, and we have quoted it above in our petition. It is in this omitted part that the Court put the proposition to the jury that payments made in contemplation of candidacy could be considered in violation of section 12-H (R. 1187). The opinion, having thus failed to disclose the point, also avoided deciding it, as follows (R. 1258):

> "We fail to see how this instruction concerns Egan's appeal. The instruction is applicable to the substantive offenses charged in Counts 2 to 8, inclusive, and not to the conspiracy charge. There was abundant evidence of overt acts under the conspiracy charge of contributions to candidates for various offices, federal and nonfederal, and to political parties and committees. Since Egan was not convicted upon the substantive counts of the indictment, he cannot complain on appeal of the instructions relating to these counts."

This is an absolute misconception of the record. The indictment shows that this part of the Court's charge had no reference whatever to counts 2 to 8 (R. 23-31). These counts charged contributions to named candidates then, in fact, running for office, and made during their campaigns —see testimony of candidates named in these counts (R. 615, 614, 613, 609, 607, 611 and 616). On the other hand, the evidence referred to in the Court's charge was the mass of evidence admitted over petitioner's objection (R. 408, 409, 411, 412), tending to prove that commissions on company insurance were split with brokers who were also State Senators and City Aldermen, and who were not at the time candidates for any public office (R. 406-9, incl., 587-97, incl.). This evidence was coupled with other evidence to prove that petitioner knew of these insurance practices—see Spoehrer's affidavit, Government Exhibit No. 70 (R. 76, 77, 441-3, 821-7). It was all offered solely on the conspiracy count, the purpose being to prove that the payments in question were overt acts in furtherance of the conspiracy and that petitioner knew all about it. It was part of the chain of evidence by which it was sought to connect petitioner with the conspiracy.

Petitioner objected to the evidence and excepted to the charge. He was convicted on the conspiracy count and has a right to complain both of the reception of this incompetent and prejudicial testimony, and the misdirection by the Court as to its legal effect.

We submit that if any part of section 12-H can be held valid, this matter of its proper construction becomes an important question of federal law that should be settled by this Court.

A similar question of statutory construction was deemed sufficiently important to warrant certiorari in the Viereck case (318 U. S. 236).

The charge was also erroneous because not supported by any evidence. The Government offered no proof whatever

that the payments to the insurance broker office holders were either in contemplation of a candidacy or in any way connected with a candidacy.

(4) The Test of Criminal Liability Applied by the Court of Appeals Conflicts With the Decisions in Other Circuits and Is Against the Weight of Authority.

After conceding that the decisions in other circuits, some of which the court below cites, sustain the rule that (R. 1245),

> "Mere knowledge, presence, acquiescence or approval of the unlawful acts of others is not enough; that proof of intentional participation must also be shown,"

the opinion then goes on to hold (R. 1246-7):

> "If the accused has a legal responsibility in the premises, if he has some interest in the success of the conspirators in the accomplishment of their design, if the conspirators informed him of their plan and keep him advised of the steps taken by them to attain their purpose, and he by his approval stimulates their activities, if he also knows that such activities are illegal, and if such activities are so numerous as to constitute a course of business, or are so related as to constitute a system of unlawful conduct continuing over a long period of time, then the jury upon evidence of such facts would be warranted in finding him guilty."

It thus omits the essential element of participation and, in lieu thereof, it includes, in addition to knowledge and approval, the following: (a) Legal responsibility; (b) interest, and (c) that the activities cover a long period of time and constitute either a course of business or a system of unlawful conduct.

We deny that the presence of these elements either constitutes proof of participation or supplies the lack of such

proof. No authority can be found for such a modification of the rule. It conflicts with the law as declared in the Second, Fifth, Sixth, Seventh, Ninth and Tenth Circuits in the decisions cited supra in our petition under "Reasons for Granting the Writ (3)."

One or more of these elements, (a), (b) and (c), supra, were present in most of the cases cited from the above Circuits, yet proof of intentional participation was, nevertheless, held essential.

In the Weniger case, 47 Fed. (2d) 692, a sheriff, under state law, had a legal responsibility in the premises (l. c. 692, first col., last par.); he also had an interest in the success of the conspiracy, to wit, the political support of the conspirators (l. c. 693, second col., third par.) and the law violations were numerous and constituted a course of business, all with the Sheriff's approval.

In the Potash case (118 Fed. [2d] 54), the defendant, Kochinsky, had an interest in the success of the conspiracy to influence witnesses, as he was a defendant in the anti-trust case (l. c. 55).

In the Marrash case (168 Fed. 225), the defendants had both knowledge and an interest in that "the merchandise was imported for their benefit" (l. c. 231).

In the Patterson case (222 Fed. 599), knowledge and acquiescence by a corporate officer of a criminal course of conduct carried on by other officers was held insufficient to convict.

In the Young case (48 Fed. [2d] 26), and in the Bacon case (127 Fed. [2d] 985), and in the Zito case (64 Fed. [2d] 772), the activities were numerous and constituted a course of conduct.

These illustrations could be multiplied. They demonstrate that the special facts postulated in the opinion of the Court of Appeals do not modify the rule. To so modify it would permit a defendant to be convicted of crime without proof of any criminal act. That the Court

of Appeals rule is unsound appears from the reasoning in the above and the other cases cited in our petition herein.

We contend, further, that there is no substantial evidence in this record to prove the elements postulated in the Court of Appeal's opinion as being sufficient to convict. We pointed this out to the Court of Appeals in our petition for rehearing (R. 1263-5). It would unduly lengthen this brief to argue the point here, but we expect to brief it fully if certiorari is granted. We deem it sufficient, at this time, to point out that the Court of Appeals has applied a novel test of criminal liability in conspiracy cases that is in conflict with the law as declared in at least six other circuits, and is against the weight of authority.

We submit that, in the interest of uniformity, this conflict should be settled by this Court.

CONCLUSION.

Because of the importance of the federal questions presented, and for the other reasons set out in our petition and brief herein, we submit the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS BOND,
Attorney for Petitioner.

October 2, 1943.